In the Supreme Court of the

OCTOBER TERM, 1973

No. 73-1232

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA,
LOCAL UNION NO. 1,

Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

TABLE OF CONTENTS.

APPENDIX.

(Printed under separate cover.)

TABLE OF AUTHORITIES.

Cases.

Statutes.

Other.

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To the United States Court of Appeals For the Sixth Circuit.

Petitioner, Allied Chemical & Alkali Workers of America, Local Union No. 1, intervenor in the proceeding below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on June 10, 1970.

OPINION BELOW.

The opinion of the court of appeals is reported at 427 F.2d 936 (1970) (App. A, pp. 12-19).* The order denying petition for rehearing of the National Labor Relations Board is printed in Appendix C, p. 22. The findings of

* All appendices are printed and bound separately in one volume.

fact, conclusions of law and order of the National Labor Relations Board (App. D., pp. 22-55) are reported at 177 NLRB No. 114 (1969). The trial examiner's decision is printed in Appendix E, pp. 55-73.

JURISDICTION.

The judgment of the court of appeals was entered on the 10th day of June, 1970. A timely petition of the National Labor Relations Board for rehearing *en banc* was denied on the 31st day of July, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

(1) Whether an employer is required to bargain with an incumbent union about changing health insurance benefits previously negotiated with the union covering employees who had retired.

(2) Whether the Board properly found that the Company unilaterally changed its negotiated health insurance plan for employees who had retired, thereby violating Section 8(a)(5) and (1) of the Act.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix F, pp. 74-78.

STATEMENT.

A. THE BOARD'S FINDINGS OF FACT.

Following the enactment of Medicare the Union sought in-term bargaining with the Company concerning its effect upon the health plan of retired employees who had been employed by the Company in the collective bargaining unit represented by the Union. The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about its request to adjust the Company's plan to the benefits provided by Medicare. The Board also found that the Company violated the Act when it unilaterally changed its health insurance program for retired employees.

The Union has been the exclusive collective bargaining agent since January, 1949 for all of the Company's hourly-rated employees at its Barberton, Ohio plant (App. D, p. 24). In 1950 the parties negotiated a labor agreement containing provisions for a pension, hospitalization and surgical insurance plan (App. D, p. 24). Beginning in that year the parties provided hospitalization insurance for retired employees under an oral agreement (App. D, p. 24). Continuing thereafter until 1964, the Union and the Company at appropriate times negotiated and entered into more formal agreements providing a health insurance plan for the retired employees (App. D, pp. 24, 25). The parties likewise agreed on an increase in pensions for employees retiring after June 28, 1962, and age 65 became the mandatory retirement age beginning in June, 1964 for all bargaining unit employees (App. D, p. 25):

In 1964 the Company agreed to raise its monthly contributions from $2.00 to $4.00 per month toward the cost of the insurance premium for those employees who

retired after June, 1964. It was understood that if Medicare was enacted the Company would withdraw the extra $2.00 contribution for the retirees (App. D, pp. 25, 26).

Medicare was passed July 30, 1965 and became effective on July 1, 1966.[1] In November, 1965, the Union proposed that the parties negotiate supplemental insurance benefits which were not available to the retired employees under the Medicare program. The Company answered that this request would be studied. In March, 1966 the Company was reminded that it had not replied to the Union's earlier request.

On March 21, 1966 the Company informed the Union that because of Medicare it would cease the contribution of the extra $2.00 per month for each retired employee which had been added under the terms of the 1964 labor agreement. The Company also stated that it would cancel the retired employees' insurance plan because Medicare had reduced the value of this plan so as to make it worthless, and, in any event, the Company's insurance carrier would not duplicate any benefits provided by Medicare (App. D, p. 26). Instead; the Company decided to contribute $3.00 a month to each eligible retired employee to be applied by him toward the cost of his supplemental Medicare coverage.[2] The Company refused the Union's request to bargain on the latter's proposal to "add-on" benefits not provided by Medicare, and the Company challenged altogether the Union's right to bargain for retired employees (App. D, pp. 26, 27).

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[1] 79 Stat. 291, 305, 42 U.S.C. Section 1395-1400(s), as amended by 81 Stat. 821, enacted Jan. 2, 1968.

[2] Under Medicare Part B, those who enrolled in the supplementary medical insurance program paid initially $3.00 a month for these added benefits. 42 U.S.C. 1395j.

The Union conceded the Company's right under contract to cease its added $2.00 contribution. It protested, however, the modification of the contract entitling retirees to participate in the health insurance plan and requiring the Company to contribute $2.00 per month for this purpose (App. D, p. 26). The Company's modification posed other problems for the Union as well. The Union asked what the Company planned respecting retired employees or their wives who were under age 65 and not eligible for Medicare (App. E, p. 61). The Company advised that it would originate a new program to cover these retirees and their wives (App. E, p. 61).

On March 23, 1966 the Company explained that after reconsideration it had determined not to cancel the retirees' health insurance plan. Instead, it would give each of the retired employees a chance to withdraw his participation in the Union-negotiated health insurance plan, in which event the Company would contribute $3.00 per month toward the retiree's payment of supplemental Medicare benefits (App. D, pp. 26, 27). The Union objected to the Company's proposal and asked that it bargain about these changes in the retirees' negotiated program. The Company refused. On March 24 the retirees were advised by mail of the Company's new program and that their enrollment for their Medicare supplemental benefits must be completed by March 31, 1966. Fifteen of the 190 retired employees cancelled their participation in the negotiated health insurance plan (App. D, p. 27; App. A, p. 4).

B. THE BOARD'S DECISION AND ORDER.

On the basis of the foregoing facts the Board (one member dissenting) reversed its trial examiner who had recommended dismissal of the complaint.[3] It found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about changes in benefits of employees previously retired from the collective bargaining unit, and who since their retirement had been the beneficiaries of a negotiated retirement plan; and also, by unilaterally changing insurance benefits of retired employees without first negotiating with the Union (App. D, pp. 47, 48).

The Board ordered the Company to cease and desist from the unfair labor practices found, and upon the Union's request to rescind any adjustment in the negotiated insurance plan for the retired employees (App. D, p. 48).

C. THE DECISION OF THE COURT OF APPEALS.

The court of appeals refused to enforce the Board's order. Based on the facts found by the Board, which it did not disturb, it held that retirees are not employees under Section 8(a)(5) of the Act and employers are under no statutory duty to bargain collectively with unions about improvements in pension and insurance benefits of their retired employees (App. A, p. 10). The court also rejected the Board's finding that the Company unilaterally changed the negotiated insurance benefits of its retired employees (App. A, p. 11).

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[3] The trial examiner found that the Company "refused to meet and confer with the Union regarding changes unilaterally * * * made" by the Company. Nevertheless, under his interpretation retired employees were not covered by the Act. Therefore the Company was not obligated by the statute to bargain with the Union concerning a change in their negotiated benefits (App. E, pp. 63, 64; App. D, p. 27).

REASONS FOR GRANTING THE WRIT.

1. This case presents for the first time in over 30 years of statutory interpretation, the issue of whether employers are subject to the requirement of the Act that they bargain with incumbent unions about health plans and pension benefits of their retired employees (App. D, p. 29).[4]

The court of appeals' interpretation of the statute cannot be reconciled with this Court's decision in *Teamsters Union v. Oliver*, 358 U.S. 283 (1958). At issue in *Oliver* was the question of whether the fixing of a minimum rental to be paid by an employer for leased vehicles to be driven, not by his employees, but by their owners, could be subjected to collective bargaining. This Court recognized that the inadequacy of a rental paid to an owner-operator "not only clearly bears a close relation to labor's efforts to improve working conditions, but is in fact of vital concern to the carrier's employed drivers," *Teamsters Union v. Oliver, supra,* at 294. Bargaining about changes in the benefits of retired employees is of no less concern to the active employees than the adequacy of a rental to be paid the owner-operators in *Oliver*.

Active employees are vitally concerned with the level of benefits established for the retirees and that the benefits negotiated will be received. The court of appeals agreed with the Board that both the Union and active employees have a "legitimate interest" in the fulfillment of negotiated contracts protecting retirees, and active employees also have a "selfish" interest about bargaining for

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[4] The Court of Appeals accepted without dispute the principle that pensions and insurance benefits enjoyed by employees after retirement are mandatory subjects of bargaining, *Inland Steel Company*, 77 NLRB 1, enfd. 170 F. 2d 247 (CA-7, 1948), cert. denied 336 U.S. 960; *W. W. Cross & Co.*, 77 NLRB 1162, 1163-1164, enfd. 174 F.2d 875; 877 (CA-1).

retirement benefits since these benefits are "an integral part of their total compensation" (App. A, p. 17). It could not square its agreement, however, with the Board's holding that a change in the retirement benefits of the retirees was a mandatory subject of bargaining. It was the court's opinion that retirees are not "employees" within the meaning of Section 8(a)(5) of the Act.

This Court's decision in *Oliver,* however, was in no way dependent on any determination that owner-operators were "employees" within the meaning of the Act. Mr. Justice Brennan, the author of the Court's opinion, later explained:

> "*Local 24 of Intern. Broth. of Teamsters, etc. v. Oliver,* 358 U.S. 283, 79 S. Ct. 297 * * * did not, as appellees suggest * * *, hold that owner-operators are in any sense 'employees.' That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled under § 8(d) of the National Labor Relations Act * * * to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were 'employees' protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. * * *." (*United States v. Drum,* 368 U.S. 370, 382, n. 26.)

The decision below that because retirees are not "employees" within the meaning of the Act, a change in their benefits could not be made the subject of mandatory bargaining, is in conflict with this Court's decision in *Oliver.*

In *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), this Court said that one of the tests to be used in determining whether a subject of bar-

gaining is mandatory is whether the subject matter sought to regulate relations between the employer and employees. The Board pointed out in *Houston Chapter, Associated General Contractors,* 143 NLRB 409, 412 (1963), that in this regard "we do not deem the Supreme Court to have limited its definition of 'employee' to those individuals already working for the employer."

The court of appeals noted, "the evidence in the *amicus curiae* briefs tending to show that the practice in industry is to bargain on retired employees' benefits" (App. A, p. 20).[5] It characterized this tendency as a demonstration of "the increasingly humanitarian quality of the labor management relationship" (App. A, p. 20). The court's observation misses the point. Industry practice is significant not as a humanitarian quality but because the statutory requirement that parties "bargain collectively * * * generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States" *Telegraphers vs. Railway Express Agency,* 321 U.S. 342, 346 (1944).

The impact of Medicare upon negotiated benefits is one of the latest factors which affects the retired worker and required the Union to review constantly the pension and old age insurance benefits. Medicare unsettled retirement benefits which the parties had agreed to in 1964. Private programs had to be coordinated with various federal and state programs so that duplication of benefits was avoided and adequate coverage assured. The

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[5] The extent of the practice is revealed in part by figures which show 26 million workers are covered by collective bargaining plans negotiated between management and labor. *Social Security Programs in the United States,* U. S. Dept. of Health, Education and Welfare, Social Security Administration, Wash. 1968, p. 16.

scope of the benefits for individuals 65 years of age or over suggests strongly the necessity to mesh these public law benefits with any private insurance plan. 42 U.S.C. 1395k. A union's role is not lessened because the retiree is no longer on the active payroll. On the contrary, a union's role is broadened because of the changed status of the retiree.

The decision of the court below conflicts in principle with this Court's holding in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964). The court erroneously narrowed the Board's interpretation of the Act to a point inconsistent with its statutory purpose and contrary to the intent of Congress. It ignored what this Court said in *Fibreboard*, that refusals to bargain "had been one of the most prolific causes of industrial strife," and that bringing within the framework of collective bargaining subjects which reflect the industrial practices of the country was "most conducive to industrial peace," *Fibreboard Paper Products Corp. v. N.L.R.B., supra*, at 211. Experience indicated to this Court that "contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework," *Fibreboard Paper Products, supra*, at 211. The purpose of the statute is to reduce the area of conflict without setting "precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining," *International Teamsters, etc. v. Oliver*, 258 U.S. at 294.

In *Houston Chapter, Associated General Contractors, supra*, at 413, the Board noted that "[a]s the relationship between employers and employees evolves, new areas may be found which affect 'wages, hours, and other terms and conditions of employment,' and thus the list of mandatory subjects of bargaining quite properly is enlarged."

2. In yet another respect, the lower court's decision is contrary to accepted judicial construction of Section 302 (c) of the Act by the Eighth and Ninth Circuit Courts of Appeals. Those courts have held that the term "employees of such employer" in Section 302(c)(5) includes both "current employees and persons who were current employees but now retired," *Blassie v. Kroger Co.*, 345 F.2d 58, 70 (CA-8, 1965); *Local No. 688, International Bro. of Teamsters v. Townsend*, 345 F.2d 77 (CA-8, 1965); *Garvison v. Jensen*, 355 F.2d 487 (CA-9, 1966). The lower court was "unpersuaded" by the decision in *Blassie* because it involved a construction of Section 302 of the Act, a criminal provision prohibiting employer payments to a union unless brought within the exceptions of Section 302(c)(5). This latter provision permits employer contributions to trust funds for the exclusive benefit of employees and retirees, whereas the instant case dealt with the word "employee" as it appears in Section 8(a)(5) of the Act.

In the *Blassie* case the court of appeals reversed the district court which had enjoined trustees from expending trust assets for the benefit of persons who were retired employees of a contributing employer. It refused to accept the district court's construction that the statute restricted current enjoyment of benefits "to persons in active employment." It said:

> "(c) * * * the presence of these two requirements—payment by the employer and current employment—does not mean that benefits which flow from these contributions of the employer (and from any other receipts of the Trust) are to be confined in their enjoyment to the period of the employee's active employment. There is nothing in the statute which clearly proscribes this and we see nothing in its

language which could support so restrictive an inference."

In *Garvison v. Jensen,* 355 F.2d 487, the Ninth Circuit held that a pension and welfare fund created as a result of collective bargaining was not invalid because previously retired employees were entitled to benefits.

3. The second question presented deals with the Board's finding that the Company unilaterally changed its medical insurance plan for retired employees (App. D, p. 47). The lower court erroneously confused the issue by holding that this was "not the case of an employer unilaterally abrogating contractually vested retirement benefits of retirees" or of an employer "bypassing the union and bargaining directly with active employees" (App. A, p. 10). The Company, as both the trial examiner and Board found, refused to confer with the Union about changes and required retirees to remain in the negotiated plan or withdraw and enroll in supplemental Medicare. The lower court's holding conflicts with this Court's decision in *N.L.R.B. v. Katz,* 369 U.S. 736, 743 (1962), that an employer's unilateral change in a negotiated insurance plan violates the statute. See *N.L.R.B. v. General Electric Co.,* 418 F.2d 736 (1969), cert. denied, 90 S. Ct. 995, 90 S. Ct. 1352.

4. The questions posed by the instant case involve a fundamental interpretation and application of the national labor law and are of far-reaching importance to both industry and labor. The lower court recognized the importance of the questions raised as to the scope of Section 8(a)(5) of the Act when it said:

"The facts which are essentially undisputed, raise a question of first impression, so far as we are able to determine, before this or any other court under the

National Labor Relations Act, as amended." (App. A, p. 2).

The increase in union welfare activity and in the number of employer-sponsored benefit and medical insurance plans has greatly accelerated health and welfare bargaining.[6] The court of appeals stated that the "purpose of federal labor legislation * * * [was] to reconcile, and * * * equalize the power of competing economic forces within the society in order to encourage the making of voluntary agreements * * *" (App. A, pp. 18, 19). It also stated that "[r]etired employees have no economic or bargaining power within this system" (App. A, p. 19). Thus, to remove from the area of mandatory bargaining the subject matter of negotiating benefits for those who as individuals "have no economic or bargaining power" does not "reconcile" or "equalize" and means that a constantly growing group of individuals will have no representation at all.

The decision below will encourage refusals to bargain about health care. Settlement of a matter of this importance in the administration of the Act is plainly in the public interest and can only be resolved by action of this Court.

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[6] Munts, *Bargaining For Health* (1967); *Private Health Insurance and Medical Care, Conference Papers,* U. S. Dept. of Health, Education and Welfare, Social Security Administration (1968).

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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